

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBIN TYLER, et al.,

Petitioners,

S168066

v.

**THE STATE OF CALIFORNIA, a political body in
its own right and/or through EDMUND G. BROWN
JR., in his capacity as Attorney General, and/or
DEBRA BOWEN, in her capacity as Secretary of
State,**

Respondents.

**SUPREME COURT
FILED**

NOV 17 2008

Frederick K. Ohlrich Clerk

Deputy

**RESPONDENT DEBRA BOWEN'S PRELIMINARY RESPONSE TO
PETITION FOR EXTRAORDINARY RELIEF, INCLUDING WRIT OF
MANDATE AND REQUEST FOR IMMEDIATE INJUNCTIVE RELIEF**

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE
OF CALIFORNIA, AND THE HONORABLE ASSOCIATE
JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to this Court's request dated November 12, 2008 and California Rule of Court, rule 8.490(g), Respondent Debra Bowen, in her official capacity as Secretary of State, submits this preliminary response to the Petition for Extraordinary Relief filed by Petitioners Robin Tyler, et. al. (*Tyler Am. Pet.*).

I.

INTRODUCTION

As part of their request for relief from this Court, Petitioners seek a writ of mandate to prevent the Secretary of State from certifying the results of the November 4, 2008 election. (*Tyler Am. Pet.*, at p. 11.)

However, the Secretary of State's certification of the election results with respect to Proposition 8 is unrelated to Petitioners' ability to pursue a lawsuit challenging the constitutionality of Proposition 8 and does not prevent this Court from granting the other prayers for relief in the petition for writ of mandate. Consequently, the Secretary of State requests that she be permitted

to certify the results of the election pursuant to the provisions of the Government and Elections Codes and be dismissed as a respondent in this petition.

II.

THE SECRETARY OF STATE'S MINISTERIAL FUNCTION OF CERTIFYING THE ELECTION RESULTS DOES NOT PREVENT THIS COURT FROM CONSIDERING THE CONSTITUTIONALITY OF PROPOSITION 8

The Secretary of State is required to certify and declare the result of all elections upon any question submitted by initiative and make an official declaration of the vote upon each question. (Gov. Code, § 12165.) The certification shall issue no later than the 39th day after the election. (Elec. Code, § 15501, subd. (b).) However, initiatives that receive a majority vote go into effect the day after the election so long as the initiative did not specify any particular effective day. (Cal. Const., Art. XVIII, § 4.)

This Court has previously held that mandamus would not be issued to prevent official recordation of the vote of the people regardless of the apparent unconstitutionality of the measure in *Kevelin v. Jordan* (1964) 62 Cal.2d 82 (*Kevelin*). During the general election on November 3, 1964, the voters of California passed Proposition 13, entitled "An Act to Preserve Free Television in California." (*Id.*, at p. 83.) The petitioners filed an original writ of mandate in this Court arguing that the proposition was defective and violated the federal and state constitutions and seeking to prevent the Secretary of State from filing a statement of the vote. (*Ibid.*) This Court rejected the petitioners' argument, finding that such action by the Secretary of State is a ministerial function and that there is no provision in the constitution or state statutes that empower the Secretary from refusing to certify the election on the basis that the proposition is invalid. (*Ibid.*) Additionally, this Court noted that it would be "an intolerable interference

with the people's reserved legislative power to prevent the official recordation of their vote." (*Ibid.*) Accordingly, this Court denied the petition for writ of mandate.

III.

CONCLUSION

In the current petition, this Court is faced with the same facts as those of *Kevelin, supra*, 62 Cal.2d 82. Petitioners seek to prevent Secretary Bowen from performing her ministerial duty to certify the election results. Whether the election results are certified is immaterial to this Court's ability to consider the constitutionality of Proposition 8. Consequently, Secretary Bowen should be allowed to perform her ministerial duty and certify the result of the November 4, 2008 election. Additionally, Secretary Bowen should be dismissed as a respondent from the petition as there is no other prayer for relief in the petition directed toward the Secretary of State.

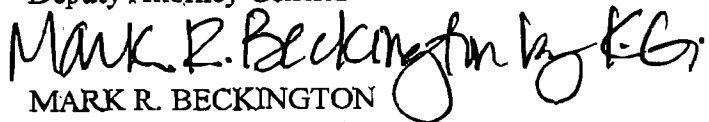
Dated: November 17, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE**(CALIFORNIA RULES OF COURT, RULE 8.208 (c) (1))**

I hereby certify that:

Pursuant to California Rules of Court, Rule 8.208 (c) (1), in reliance upon the word count feature of the software used, I certify that the attached Respondent Debra Bowen's Preliminary Response to Petition for Extraordinary Relief, Including Writ of Mandate and Request for Immediate Injunctive Relief contains 908 words.

Dated: 11/17/08

K. J. Graham
KIMBERLY J. GRAHAM

DECLARATION OF SERVICE BY FACSIMILE AND OVERNIGHT MAIL

Case Name: **Robin Tyler, et al. v. The State of California, et al.**

Case No.: **S168066**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with **Golden State Overnight and FedEx**. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business. My facsimile machine telephone number is (916) 324-4293.

On November 17, 2008, I served the attached **Respondent Debra Bowen's Preliminary Response to Petition for Extraordinary Relief, Including Writ of Mandate and Request for Immediate Injunctive Relief** by transmitting a true copy by facsimile machine, pursuant to California Rules of Court, rule 2.306. The facsimile machine I used complied with Rule 2.306, and no error was reported by the machine. Pursuant to rule 2.306(g)(4), I caused the machine to print a record of the transmission, a copy of which is attached to this declaration. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, addressed as follows:

Representing Petitioner Robin Tyler:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 17, 2008, at Sacramento, California.

Gladys Lopez
Declarant


Signature